IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs October 25, 2006

STATE OF TENNESSEE v. DEVARIAS MANDRELL LOCKE

Direct Appeal from the Circuit Court for Williamson County
No. II-8416 R.E. Lee Davies, Judge

No. M2006-00020-CCA-R3-CD - Filed February 1, 2007

Pursuant to a bench trial in the Williamson County Circuit Court, the appellant, Devarias Mandrell Locke, was found guilty of two counts of selling .5 grams or more of cocaine, a Schedule II controlled substance. On appeal, the appellant challenges the cooperating individual's "perjury" during the bench trial and the sufficiency of the evidence supporting his convictions. Upon our review of the record and the parties' briefs, we affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court are Affirmed.

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which DAVID H. WELLES and J.C. MCLIN, JJ., joined.

Mark C. Scruggs, Nashville, Tennessee, for the appellant, Devarias Mandrell Locke.

Paul G. Summers, Attorney General and Reporter; Jennifer L. Bledsoe, Assistant Attorney General; Ronald L. Davis, District Attorney General; and Sean Duddy, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Factual Background

At the appellant's bench trial, three witnesses testified on behalf of the State: Joey Kimble, the director of the Twenty-first Judicial District Drug Task Force; Sylvester Island, a cooperating individual; and Agent Glenn Glenn, a special agent with the Tennessee Bureau of Investigation crime laboratory. The State's proof at trial reflected that in December 2002, Director Kimble and other agents with the Drug Task Force were working with Island to make undercover drug buys in the Natchez Street area of Franklin. The Drug Task Force paid Island $100 for each buy and helped him with an apartment and living expenses. On December 16, 2002, the agents met with Island at a prearranged location and discussed the plan of operation. Agents searched Island and his vehicle for

contraband and, finding none, supplied Island with $100 in "marked" money to make a drug purchase. Island was equipped with a transmitter which would allow the agents to monitor and make an audio recording of any drug deals.

After being prepared by the agents, Island drove to the Natchez Street area. Island, who was new to the area, began asking people if they knew how to find "Boodro," an individual Island had met from the area. Island asked the question to initiate a conversation and attempt to arrange a drug purchase. Director Kimble stated that the agents were able to maintain audio surveillance on Island but were unable to consistently visually monitor the deals. He explained, "If we got into the area and our cars were seen, then we wouldn't be able to buy any drugs."

While Island was at Natchez Street, he talked with two black males, one of whom was the appellant. Island asked the appellant where he could buy a gram of crack cocaine for $100. The appellant said, "Well, I can take you to my boy and get it." The appellant and the other male got into Island's car, and the appellant gave Island directions to a house in the Mount Hope area. The appellant went into the house, came back to the car, and gave Island .8 grams of crack cocaine in return for $100. Island drove the two men back to the Natchez Street area and returned to the prearranged location to meet with the agents. When Island met with the agents, he relinquished possession of the crack cocaine.

On January 8, 2003, Island again met with Director Kimble and various agents. Island was searched for contraband, fitted with a transmitter, and supplied with $100 in buy money. Afterward, Island went to the H.G. Hill parking lot where he had arranged to meet the appellant. Ten minutes later, the appellant, who was driving an older model white Buick, arrived with a friend. Island told the appellant that he needed about $100 worth of additional crack cocaine. At the appellant's direction, Island followed the appellant to a car wash on Columbia Avenue. The appellant drove into a stall and told Island to get into the appellant's car. Island got into the back seat, and the appellant threw a bag filled with 1.1 grams of crack cocaine onto the back seat. Island gave the appellant $100 and rendezvoused with the agents, again relinquishing the crack cocaine.

The appellant presented no proof at trial.

Based upon the foregoing, the trial court found the appellant guilty of two counts of the sale of .5 grams or more of cocaine. The appellant challenges the cooperating individual's "perjury" during the bench trial and the sufficiency of the evidence supporting his convictions.

II. Analysis

On appeal, the appellant does not dispute that the proof adduced at trial reflects that the appellant sold crack cocaine to Island. Instead, the appellant contends that "[t]he evidence cannot support the court's verdict when the sole evidence against the [appellant] comes from an informant who commits perjury." The appellant complains that after he filed his appeal, he found an opinion from this court "which has an extensive discussion of Mr. Island and his record." The appellant

argues that part of Island's record which was listed in the opinion was not disclosed to the trial court in the instant case during Island's trial testimony.[1] The appellant also complains that "it is clear that [Island] committed perjury in this case when he claimed to have identified [the appellant] from a photo line-up which [Director] Kimble testified never happened." The appellant argues that Island "clearly lied about his alleged photo line-up identification of the [appellant] and misled the parties and the Court regarding his prior convictions."

First, we will address the appellant's claim that Island committed perjury by testifying that he had identified the appellant in a photographic line-up. Our review of the record reveals that on cross-examination, Island testified that he had identified the appellant in a photographic line-up. However, on redirect examination, Island explained that he did not specifically recall identifying the appellant but knew that he had made identifications from photographic line-ups in many other cases. Director Kimble testified that there was no photographic line-up in the instant case. We conclude that Island did not "perjure" himself with the foregoing testimony.

Additionally, the appellant asserts that after filing the appeal in the instant case, counsel discovered an unpublished opinion by this court, State v. Dedrick Dewayne Chism, No. W2002-01887-CCA-R3-CD, 2003 WL 23100335, at *5 (Tenn. Crim. App. at Jackson, Dec. 23, 2003).[2] The appellant maintains that Island was also a cooperating individual in the Chism case and that Island failed to disclose to the trial court in the instant case that he had an additional conviction for "theft." In sum, the appellant "respectfully requests [this] Court to reverse the Trial Court and dismiss the case" based upon the newly discovered evidence regarding Island's criminal record.

We note that the appellant did not file a motion requesting the trial court to consider the "newly discovered evidence"; instead, the appellant chose to raise this issue for the first time on appeal. The issue has not been addressed by the trial court, and we will not address issues raised for the first time on appeal. State v. Alvarado, 961 S.W.2d 136, 153 (Tenn. Crim. App. 1996); State v. Turner, 919 S.W.2d 346, 356-57 (Tenn. Crim. App. 1995).[3]

Nevertheless, we note that the trial court was aware of a significant portion of Island's prior criminal history. In finding the appellant guilty, the trial court stated:

> It is true that the State's case rest[s] in large, to a large degree on the testimony of Mr. Island. In reviewing Mr. Island's testimony, I find him to be credible. . . .

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[1] The appellant does not contend that the State withheld information regarding Island's prior record.

[2] We note that the Chism opinion was filed almost two years prior to the trial in the instant case.

[3] A claim of newly discovered evidence should be addressed by the filing of a petition for a writ of error coram nobis in the trial court. When the claim is made while the appeal is pending, the petitioner should seek a stay of the appellate proceedings until after the trial court reaches a decision on the petition. State v. Ratliff, 71 S.W.3d 291, 295 (Tenn. Crim. App. 2001).

> I'll point out that in my finding regarding Mr. Island, I do note that his forgery conviction, was it 16 to 18 years ago, and as these things get older and older, they just don't carry as much weight. And I[], of course, have to be impressed by the fact that there was nothing after that. So the fact that he is a professional informant, doesn't really affect my judgment. He's apparently pretty good at it, so dope dealers beware.

The conviction the appellant complains was revealed in Chism was a 1983 conviction for stealing cattle. Chism, No. W2002-01887-CCA-R3-CD, 2003 WL 23100335, at *5. We note that there is no conclusive proof that the "Sylvester Island" spoken of in the Chism opinion is the same witness as the Island in this case. Regardless, the 1983 conviction would have occurred prior to the admitted forgery conviction. The trial court specifically opined that as convictions get older "they just don't carry as much weight." Moreover, the trial court was aware of Island's forgery conviction and nevertheless found him to be credible.

To the extent the appellant's complaints can be construed as a challenge to the sufficiency of the evidence, we note that on appeal, a jury conviction removes the presumption of the appellant's innocence and replaces it with one of guilt, so that the appellant carries the burden of demonstrating to this court why the evidence will not support the jury's findings. See State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). The appellant must establish that no reasonable trier of fact could have found the essential elements of the offense beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); Tenn. R. App. P. 13(e).

Accordingly, on appeal, the State is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn therefrom. See State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983). In other words, questions concerning the credibility of witnesses and the weight and value to be given the evidence, as well as all factual issues raised by the evidence, are resolved by the trier of fact, and not the appellate courts. See State v. Pruett, 788 S.W.2d 559, 561 (Tenn. 1990). Moreover, we note that "[i]n a bench trial, the verdict of the trial judge is entitled to the same weight on appeal as a jury verdict." State v. Holder, 15 S.W.3d 905, 911 (Tenn. Crim. App. 1999).

To sustain the appellant's convictions, the State had to prove that the appellant knowingly sold .5 grams or more of cocaine to Island. See Tenn. Code Ann. § 39-17-417(a)(3) and (c)(1) (2003). The proof at trial, which was gleaned from audio tapes of the drug purchases as well as the testimony of Island, Director Kimble, and Agent Glenn, revealed that on two separate occasions, the appellant met with Island and on both occasions exchanged more than .5 grams of crack cocaine for $100. Accordingly, based upon the testimony of the State's witnesses, we conclude that there was ample proof to support the appellant's convictions for selling more than .5 grams of cocaine.

III. Conclusion

Finding no error, we affirm the judgments of the trial court.

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NORMA McGEE OGLE, JUDGE